Supreme Court, U.S.
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No. 00-418

IN THE

Supreme Court of the United States

WILDENSTEIN & CO., INC.,
Petitioner,

vs.

GILBERT N. MICHAELS, individually,
and doing business as VISAGE FINE ART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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STATEMENT UNDER RULE 29.4(B)

Since the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress, and neither the United States nor any federal department, office, agency, officer, or employee thereof is a party, it is possible that 28 U.S.C. § 2403(a) may be applicable.[1]

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[1] This pleading and the Petition for Writ of Certiorari are being served on the Solicitor General. The scope of application of 28 U.S.C. § 2403(a) is unsettled, however. It is not clear from the lower court case law whether the statute, and in particular its reference to an Act of Congress "affecting the public interest," apply to a federal statute that touches solely on District of Columbia or state law interests, as distinguished from federal interests.

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

The Petition for Writ of Certiorari properly invokes this Court's jurisdiction and the writ should be granted so that the Court may determine whether subsection (d) of 28 U.S.C. § 1367, the 1990 supplemental jurisdiction statute, is consistent with the Tenth Amendment and Article IV, § 4 of the Constitution.

28 U.S.C. § 1367(d) is not federal regulation of the practice and pleadings in federal court, regulation permissible under *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), the decision upon which respondent Michaels relies. Instead, subsection (d) is a regulation of the substantive and procedural law governing state causes of action to be heard in state courts *after* dismissal of the federal action. By tolling state statutes of limitations on state causes of action to be heard in state courts, subsection (d) intrudes deeply into what has been considered for over two centuries the exclusive domain of state lawmaking power - the state's power either to enact statutes of limitations and enforce them strictly, or to adopt equitable tolling rules requiring the plaintiff to show it diligently pursued its claims in the first action, it was left without a judicial forum due to forces outside its control, and the defendant would not be prejudiced by the tolling. Subsection (d) does not codify any of these diverse state rules; rather, it displaces them entirely with a mechanical, federal 30-day tolling period.

II. THIS COURT HAS JURISDICTION: BY PLAIN STATEMENT, THE CALIFORNIA COURT OF APPEAL'S DECISION IS BASED ON 28 U.S.C. § 1367(d), NOT ON A SEPARATE AND INDEPENDENT STATE GROUND.

Contrary to Michaels' assertion, the California Court of Appeal's decision on the tolling of the statutes of limitations is, by plain statement, based on 28 U.S.C. § 1367(d), not on a separate and independent state ground. (Brief in Opposition at 9-12). This Court, therefore, has jurisdiction pursuant to *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

After noting that Michaels "offers several reasons to conclude" his claims were not "barred by limitations," the California Court of Appeal stated: "[w]e agree with *one* of these reasons and therefore do not discuss the others." (Emphasis added). (App. A 8.) The court immediately stated:

> The Federal Court dismissed Michaels' complaint on October 6, 1995. This action was filed 18 days later, on October 24, 1995. Under 28 U.S.C. § 1367(d), this action was timely filed. (App. A 9).

In making its holding, the court rejected Wildenstein & Co.'s argument that subsection (d) was unconstitutional as "stand[ing] in opposition to principles of state sovereignty." (App. A 12.)

III. FURTHER, THE DECISION BELOW IS NOT SUPPORTED BY A SEPARATE AND INDEPENDENT STATE GROUND. SUBSECTION (d) OF THE SUPPLEMENTAL JURISDICTION STATUTE DISPLACES, RATHER THAN CODIFIES, STATE STATUTE OF LIMITATIONS RULES INCLUDING THE CALIFORNIA EQUITABLE TOLLING DOCTRINE WHICH GOVERNS A CHALLENGE TO THE PLAINTIFF'S DILIGENCE AND GOOD FAITH IN PURSUING THE FIRST ACTION.

Contrary to Michaels' assertion, the California Court of Appeal's decision is not based on a separate, and independent state ground, much less one that is tenable. Even accepting for purposes of argument Michaels' view that the decision should be read as based partially on a state ground, the federal ground would still be primary and the state ground would be neither separate nor independent, but closely interwoven with the court's conclusion that the suit may proceed because Michaels complied with the 30-day filing requirement in 28 U.S.C. § 1367(d). Additionally, any purported state ground would not be tenable.

Subsection (d) of 28 U.S.C. § 1367 entirely displaces, rather than codifies, state statute of limitations rules governing the filing of a second action, including equitable tolling doctrines. In fact, some states strictly enforce their statutory periods for bringing suit while other states, such as California, use equitable tolling rules which include a focus on the plaintiff's conduct in the first action and do not

excuse delay that was of the plaintiff's own making. (Petition at 9, n.2 and 26-27.) Subsection (d) replaces these strictly-enforced state statutory periods or state equitable tolling rules with a mechanical, federal 30-day tolling period.

Further, California's equitable tolling doctrines are not the simple, single-dimension rule that Michaels proclaims. (Brief in Opposition at 10-11, 19.) Equitable tolling rules vary depending on the circumstances to which they must apply. The special rule invoked by the California Court of Appeal and Michaels applies *only* when no question has been raised about the plaintiff's good faith and diligence in pursuing the first action. *See e.g., Addison v. State of California,* 21 Cal.3d 313 (1978) (not challenging the plaintiff's diligence in pursuing the first action, defendants contended that equitable tolling was inapplicable to actions against public entities). This is not such a case.

True, the decision below stated that subsection (d) of 28 U.S.C. § 1367 codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another, and that the inquiry is on the plaintiff's conduct between the dismissal of the first action and the filing of the second. (App. A 12.) For this proposition, the court cited *Kolani v. Gluska,* 64 Cal.App.4th 402 (Cal.App. 1998). (App. A 12.) In *Kolani,* however, there was no challenge — as there is here — to the plaintiff's good faith and diligence in pursuing the federal court action: at issue only was plaintiff's 78-day delay in filing the second action. In turn, *Kolani* relied on *Addison, supra,* which did not

involve a challenge to the plaintiff's diligence and good faith in pursuing the first action.

Under well-settled California Supreme Court precedent from which the California court could not depart, when the defendant challenges the plaintiff's conduct in the first action the doctrine of equitable tolling does not turn on a simple, one dimensional look at the plaintiff's conduct *after* the first suit was dismissed. Instead, in such cases the California doctrine of equitable tolling requires a multi-faceted review that centers on three elements: whether the plaintiff can show it diligently and in good faith filed and pursued its claims in the first action, it was left without a judicial forum due to forces outside its control, and the defendant would not be prejudiced by the tolling. *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 410 (1944); *Hull v. Central Pathology Service Medical Clinic*, 28 Cal.App.4th 1328, 1336 (Cal.App. 1994); *see also Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997) (stating court's belief that California equitable tolling rule would not apply when a claim had been pending for a long time and was then voluntarily dismissed and refiled, or when the plaintiff delayed in proceeding on the claim). It is precisely because 28 U.S.C. § 1367(d) fails to reach these questions of the plaintiff's conduct in pursuing the first action that it *displaces*, rather than codifies, the California doctrine of equitable tolling.

In addressing equitable tolling, Michaels complains that Wildenstein & Co. erred in saying he never validly invoked the federal court's jurisdiction. (Brief in Opposition at 11, 18.) This is a sensitive point to Michaels because it cuts to the good faith and

diligence requirements of the California equitable tolling doctrine which governs his case.

Michaels invoked the federal court's jurisdiction twice, both times without validity. The first time was June 28, 1993, when Michaels filed a complaint purportedly based on RICO, and the second time was June of 1995, when he filed a second amended complaint purportedly based on diversity jurisdiction. Michaels offers no explanation why, if he were acting diligently and in good faith and his first complaint presented a valid claim under RICO, a statute allowing extraordinary remedies, he would refuse to file a RICO statement as required by the federal court, engage in further delay, and then file a second amended complaint in June of 1995 which makes no reference to RICO. The federal court told him point blank: "when you focused on it, you really didn't have a federal claim. It's not even that the federal claim was dismissed, you withdrew it." (App. D 4.) Similarly, Michaels offers no explanation why, if he were acting diligently and in good faith and his second amended complaint under New York law were supported by diversity jurisdiction, he again delayed and did not proceed with the evidentiary hearing suggested by the federal court to determine diversity jurisdiction. The federal court dismissed the second amended complaint for lack of diversity jurisdiction on October 6, 1995, a dismissal that Michaels does not contend was in error.

The simple truth is that Michaels did not validly invoke the federal court's jurisdiction in either instance but rather needlessly instituted a federal claim which had no merit and then delayed the litigation as long as possible to remain in federal

court. (Petition at 4-5.) Any contrary suggestion by Michaels or the Court of Appeal is simply untenable. Michaels' forum-shopping, and his lack of good faith and diligence, squandered more than two years in federal court. Because of this gamesmanship, Michaels found himself in October of 1995 without a judicial forum for his remaining state law claims which at that time were not even California claims, but New York claims.

As if to justify his conduct in the first action, Michaels repeats the Court of Appeal's statement that Wildenstein & Co. is in the same position as if the case had been filed originally in state court. (Brief in Opposition at 9, 19-20.) This comment is not accurate. To highlight a general problem, a plaintiff knows, because of 28 U.S.C. § 1367(d), that it can forum shop in federal court with a questionable claim and negotiate for settlement, without spending time or resources on trial preparation, while the defendant may be required to prepare for trial. If plaintiff decides the federal forum is not to its liking it can easily secure a dismissal and refile its state claims in state court, with the defendant again being required to prepare for trial but this time in a different forum and under different rules. Wildenstein & Co. was severely prejudiced by all of Michaels' conduct. Had Michaels conducted the litigation in a diligent, good faith manner, he would not have filed seven complaints in three different courts, requiring Wildenstein & Co. to fight a three-front war for well over five years. In 1993 Michaels would not have filed a RICO claim in federal or state court because he never had a RICO claim. In 1995 Michaels would not have filed New York claims, and dropped the

California claims, in his effort to conjure up diversity jurisdiction. Nor in 1997 would Michaels have filed suit with New York claims in the New York Supreme Court, ostensibly to protect himself in the event the California claims were dismissed. As the Los Angeles Superior Court observed at the July, 1998 hearing on Wildenstein & Co.'s motion for summary judgment and as Michaels does not contest, California's "five year rule" for bringing cases to trial or dismissing them had been exceeded based on the June 28, 1993 date Michaels originally filed the action in federal court. (App. E 4.) Cal.Civ.Proc Code § 583.310 (West 1984).

IV. THIS COURT SHOULD DECIDE THE TWO IMPORTANT CONSTITUTIONAL ISSUES PRESENTED BY THE PETITION.

Michaels does not directly respond to Wildenstein & Co.'s argument that subsection (d) of 28 U.S.C. § 1367 involves not the regulation of practice and pleadings in federal courts, which is permitted by *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), but rather the regulation of a state statute of limitations on a purely state law claim *after* it has been dismissed by the federal court and is to be heard in state court.

Instead, Michaels attempts to distance state tolling doctrines from statutes of limitations by saying that subsection (d) of the 1990 supplemental jurisdiction statute does not affect state statutes of limitations in state law cases. (Brief in Opposition at 16.) For this point, Michaels cites a decision which preceded the statute by more than four decades, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In fact, *Ragan* establishes that the diverse rules which

comprise the state's policy on the length of the limitations period are an *integral* part of the "measure" of the state-created cause of action. *Id.*, 337 U.S. at 553-534. Tolling is one such rule. In *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 485-486, 487 (1986), this Court concluded that state law provisions regarding tolling, revival and questions of application are virtually always *inter-related* with the chronological length of the limitation period, such period itself being fundamental to a state's "well-ordered judicial system." This inter-relationship of significant state policy interests that cannot be unbundled is precisely what subsection (d) impermissibly targets.

Michaels also cites *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), but this decision does not in any way support his belief that Congress has the power to enact removal provisions without regard for the effect on state statute of limitations. (Brief in Opposition at 15-16.) The Court simply concluded that the removal statute supports a district court's power to remand state law claims when it chooses not to exercise jurisdiction over them.

As shown by the Petition, subsection (d) of 28 U.S.C. § 1367 infringes on the sovereign right of the state legislatures and courts to determine whether their statutes of limitations shall be strictly enforced in their own courts, or be subject to equitable tolling rules which require the plaintiff to show diligence and good faith throughout the litigation, plaintiff is left without a forum due to forces outside its control, and the defendant would not be prejudiced by tolling. (Petition at 19-21, 23-27, 29-30.) Subsection (d) "add[s] something to the cause of action," *see Ragan*,

337 U.S. at 553-534, by giving it a new life after federal court dismissal even though the state which created the claim might reject it as time-barred because the state strictly enforces its statutes or the plaintiff did not satisfy the state's equitable tolling rules. Lastly, contrary to Michaels' view, subsection (d) is not essential to any federal interest, including an interest in avoiding the "chilling" of federal claims to be filed in federal court. Congress easily could have handed the tolling issue in many acceptable ways without infringing on state sovereignty. (Petition at 25-26.)

Any federal statute which appears to exceed the limits of Congress' Article III powers requires close examination. Subsection (d) of the supplemental jurisdiction statute plainly crosses that line. As a result, this Court's intervention is necessary to restore the essential balance between federal and state law that is protected by the Tenth Amendment and Article IV, § 4 of the Constitution.

V. CONCLUSION

For the reasons stated in the Petition and above, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

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